

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ALFREDO KUBA,

Plaintiff,

v.

NO. CIV. S-05-0794 WBS JFM

ORDER RE: MOTION FOR
PRELIMINARY INJUNCTIVE AND
DECLARATORY RELIEF

MARINE WORLD JOINT POWERS
AUTHORITY, an unknown business
entity; SIX FLAGS THEME PARKS
INC., d/b/a Six Flags Marine
World, a Delaware corporation;
PARK MANAGEMENT CORPORATION,
d/b/a Six Flags Marine World,
a California corporation; JOE
MECK, an individual; DALE
ARNOLD, an individual; AARON
ARKY, an individual; CITY OF
VALLEJO, d/b/a Marine World
Joint Powers Authority;
VALLEJO POLICE DEPARTMENT;
LIEUTENANT SALINAS, an
individual; OFFICER DOUGLAS
WILCOX, an individual;
SERGEANT SCHROEDER, an
individual; OFFICER THOMPSON,
an individual; OFFICER
HAMMRICK, an individual;
OFFICER BAUTISTA, an
individual; RAY MATELA, an
individual; CHRIS NEVASCA, an
individual; MICAH BAKER, an
individual; RON CERVANTEZ, an
individual; and DOES 1 through

1 96, inclusive,

2 Defendants.

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4 Plaintiff Alfredo Kuba seeks declaratory and injunctive
5 relief establishing that he has a constitutional right of freedom
6 of expression at the front entrance of Marine World Park, and
7 that defendants' public assembly policy is unconstitutional.

8 Defendant City of Vallejo has filed a statement of non-opposition
9 to the motion, pursuant to Local Rule 78-230(c). Defendants Park
10 Management Corp., d/b/a Six Flags Marine World, Six Flags Theme
11 Parks, Inc., Dale Arnold, Joe Meck, Ray Matela, Chris Nevasca,
12 Micah Baker, and Ron Cervantez oppose this motion.

13 I. Factual and Procedural Background

14 In 1997, defendant Six Flags, Inc. contracted to manage
15 a portion of Six Flags Marine World with the Marine World Joint
16 Powers Authority ("MWJPA"), a public agency created by agreement
17 between the City of Vallejo and the Redevelopment Agency of the
18 City of Vallejo. (Pl.'s Mot. for Preliminary Injunctive and
19 Declaratory Relief, Evans Decl. Ex. 6 (Amended and Restated 1997
20 Management Agreement Relating to Marine World).) MWJPA's purpose
21 is to accept conveyance of the assets, assume the liabilities,
22 and protect the City of Vallejo's interests related to Marine
23 World ("the park"). (Id. at 2.) Moreover, MWJPA bears the
24 "overall responsibility for all activities and facilities at
25 Marine World." (Id.) Defendant Six Flags, Inc. operates the
26 park pursuant to a long-term lease, paying nominal rent in the
27 amount of one dollar per year per forty acres of land (id. Ex. 7
28 (Parcel Lease) at 5), and receiving a management fee and 80% of

1 the net cash flow generated by the combined operations of the
2 park. (Id., Ex. 3 (U.S. Securities and Exchange Commission Form
3 10-K) at 2.) Defendant MWJPA receives the remaining 20% of the
4 net revenue. (Id., Ex. 9 (Revenue Sharing Agreement) at 5.)

5 The land at the park is divided into two categories: a
6 public parcel and a private parcel. (Id., Ex. 7 at 3.) The
7 private parcel is leased by Six Flags, Inc., but the public
8 parcel is, as its name suggests, public land. (Id.) The public
9 parcel includes parking facilities, the front entrance, the entry
10 area including ticket sales and admission facilities, public
11 walkways, paths, restrooms, dining facilities, and other areas
12 intended for use by patrons. (Id., Ex. 8 (Reciprocal Easement
13 Agreement) at 6.)

14 Plaintiff has been arrested twice while at Marine World
15 in the "public parcel" section, once while on a sidewalk, and
16 then again while on the grass outside the entrance of the park.
17 (Id., Ex. 1 (Trial Transcript).) Plaintiff was charged with
18 trespass under California Penal Code § 602(o), but the case was
19 dismissed based in part on a finding that the entire park,
20 including where plaintiff was arrested, was open to the general
21 public. (Id.)

22 Marine World has a public assembly policy ("the
23 policy") explaining that the park is a "privately managed
24 property that invites the general public." (Id., Ex. 10 (Public
25 Assembly Policy at 1).) The policy further requires that any
26 individual or group "desiring to assemble for the purpose of
27 exercising constitutional rights" must make a written request and
28 provide personal information about themselves at least seven days

1 in advance of the intended exercise of those rights. (Id.)
2 Assembly is permitted only in three locations that have been
3 expressly designated for assembly by Marine World. (Id.) The
4 policy prohibits the distribution of leaflets, handouts, fliers,
5 and other writings regardless of content and also prohibits
6 "grossly or gruesome displays." (Id. at 1-2.) The policy also
7 prohibits assembly altogether on "high volume days." (Id. at 2
8 ("Due to increased traffic activities during high volume days,
9 and to avoid problems with ingress and egress of vehicular and/or
10 pedestrian traffic, no assembly can occur [on blackout days] . .
11 . .").) These blackout days are: Memorial Day Weekend, July 4th
12 Weekend, Labor Day Weekend, and Easter Weekend. (Id.)

13 Plaintiff seeks to exercise his free speech rights with
14 a group of no more than ten people¹ at Marine World on Memorial
15 Day weekend, just two weeks from the date of oral argument on
16 this motion. (Kuba Decl. ¶ 6.) Additionally, plaintiff requests
17 immediate injunctive relief enjoining defendants from enforcing
18 their Public Assembly Policy and/or a court order for declaratory
19 relief that would establish his ability to exercise his
20 constitutional right of freedom of expression at the front
21 entrance of Marine World.

22 II. Discussion

23 A. Injunctive relief

24 "To obtain a preliminary injunction, the moving party
25 must demonstrate either (1) probable success on the merits and
26

27 ¹ Plaintiff's counsel represented at oral argument that
28 there are generally three people present at any given protest
organized by plaintiff, but that no more than ten people would
attend.

1 the possibility of irreparable injury, or (2) that serious
2 questions are raised and the balance of hardships sharply favors
3 the moving party. These are not separate tests, but are the ends
4 of a continuum; the greater the relative hardship to the moving
5 party, the less probability of success must be shown." Nat'l
6 Ctr. for Immigrants Rights, Inc. v. I.N.S., 743 F.2d 1365, 1369
7 (9th Cir. 1984) (internal citations omitted). Plaintiff seeks a
8 preliminary injunction, arguing that the balance of hardships
9 tips heavily in his favor and that he has a high probability of
10 success on the merits.

11 1. Balance of Hardships

12 Defendants' interest here is to "provide freedom from
13 the disruption of normal business operations and freedom from
14 interference with customer convenience, as well as safety to
15 guests." (Defs.' Opp'n to Mot. for Preliminary Injunctive Relief
16 6.) However, defendants fail to provide any evidence that the
17 safety of their guests is in any way threatened by plaintiff's
18 plan for a group of three to ten people to stand outside the
19 entrance of the park, hold signs, and distribute leaflets. Thus,
20 this threat to customer safety is purely speculative.

21 Moreover, although it may be reasonable to assume that
22 defendants' customers may be caused some inconvenience as they
23 attempt to enter the park, inconvenience to customers does not
24 clearly outweigh the value of exercising first amendment rights.
25 Carreras v. City of Anaheim, 768 F.2d 1039, 1046 (1985)

26 ("Annoyance and inconvenience, however, are a small price to pay
27 for preservation of our most cherished right" (quoting Wirta v.
28 Alameda-Contra Costa County Transit Dist., 68 Cal. 2d 51, 62

(1967), overruled on other grounds by L.A. Alliance For Survival v. City of L.A., 22 Cal. 4th 352 (2000)). The disruption of normal business relationships will also be short-lived, as plaintiff does not seek to enter the park, but merely plans for his group to protest at the entrance. However, defendants may experience some increased disruption or added expenses because they will have to collect the trash resulting from plaintiff's distribution of leaflets.

Plaintiff's potential hardships, by contrast, are significant and irreparable. Denying plaintiff his right to exercise his freedom of expression is a denial of constitutional rights. Unlike monetary injuries, "[a]ny loss of First Amendment freedoms, even briefly, can constitute irreparable injury." Id. at 1214 (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)). Thus, the balance of hardships clearly tilts in plaintiff's favor.

2. Probability of Success on the Merits

Plaintiff seeks the invalidation of defendants' permit policy governing the exercise of rights to free speech and assembly.² Thus, an analysis of the constitutionality of defendant's policy is required to determine the likelihood of

² Plaintiff does not specify whether his challenge is "facial" or "as-applied." A "facial" challenge alleges that the policy on its face is unconstitutional and "creates an unacceptable risk of the suppression of ideas." Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir. 1998). An "as-applied" challenge requests that the court find the policy unconstitutional as applied to the activity in which the plaintiff in particular seeks to engage. Id. Based on plaintiff's arguments for declaratory relief that the policy is unconstitutional, and the fact that plaintiff seeks injunctive relief in order to enable him to protest on Memorial Day weekend, the court presumes that plaintiff challenges the constitutionality of defendants' policy both facially and as-applied.

1 plaintiff's success on the merits.

2 Where possible, the court should attempt to address
3 issues that may be resolved without addressing federal
4 constitutional law. "Generally speaking, district courts must
5 address issues of state constitutional law prior to addressing
6 issues of federal constitutional law." Int'l Soc'y for Krishna
7 Consciousness v. City of L.A., 966 F. Supp. 956, 959 (C.D. Cal.
8 1997). In particular, "where the state provisions offer more
9 expansive protection than the federal constitution, we must
10 address the state constitutional claims in order to avoid
11 unnecessary consideration of the federal constitutional claims."
12 Id. (citing Vernon v. City of L.A., 27 F.3d 1385, 1391-92 (9th
13 Cir. 1994)). Because "[i]t is widely recognized that the Liberty
14 of Speech provision of the California Constitution provides more
15 expansive protection of speech than does the First Amendment to
16 the United States Constitution," id., the court will first look
17 to the constitutionality of defendants' actions under California
18 law.

19 a. Public Forum Analysis

20 A determination that a place is a public forum is
21 merely "constitutional shorthand for the proposition that . . .
22 government cannot regulate speech-related conduct in such places
23 except in narrow ways shown to be necessary to serve significant
24 government interests . . . even if [there are] ample alternatives
25 for communicati[on]." Prisoners Union v. Cal. Dep't of Corrs.,
26 135 Cal. App. 3d 930, 935 (1982) (quotation omitted). The first
27 question in an application of the public forum doctrine is
28 whether a particular place is a public forum. Making this

determination under California law requires determining whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Int'l Soc'y, 966 F. Supp. at 961 (quoting Prisoners Union, 135 Cal. App. 3d at 939); see also In re Hoffman, 67 Cal. 2d 845, 849 (1967); U.C. Nuclear Weapons Labs v. Lawrence Livermore Lab., 154 Cal. App. 3d 1157, 1164 (1984). "Thus, for the purposes of the California Liberty of Speech Clause, the 'public forum' doctrine is not limited to traditional public forums such as streets, sidewalks, or parks" ³ Carreras, 768 F.2d at 1045.

³ Under the broad protection offered by the California Liberty of Speech Clause, even privately owned facilities that are open to the public are subject to the public forum doctrine. See Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 854, 908 (1979). Additionally, although defendant Six Flags, Inc. is a private party, and a showing of state action is essential to establish the occurrence of a constitutional violation, Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 838 (9th Cir. 1999), actions taken by private parties may constitute state action in certain circumstances. The government may become "sufficiently entangled in the actions of a private party to warrant a requirement that such conduct conform to constitutional standards of behavior." Holodnak v. Avco Corp., 514 F.2d 285, 289 (2d Cir. 1975).

A lessor-lessee relationship between the government and a private actor and interconnected finances have been found to warrant state responsibility for the private actor's conduct. See, e.g., Avco, 514 F.2d at 289-90 (applying constitutional strictures where the government and a private corporation had a "symbiotic" relationship in that the "enterprise to which the Government contributed land, buildings, and equipment, and for which Avco supplied the labor force, was operated to their mutual benefit"); Burton, 365 U.S. at 719-720, 726 (concluding that where the government leased property to a private company, furnished heat for the premises, made structural repairs at its own expense, and retained the right to place directional signs on the exterior of the space, constitutional standards apply "as certainly as though they were binding covenants written into the agreement itself").

Here, the state agency formed by the City of Vallejo, MWJPA, owns the land, infrastructure, and buildings in question, and private entity defendant Six Flags, Inc. leases this land for a nominal fee. The management of the park is given over to

1 The compatibility of speech-related activity at a
2 government institution is tested in the following way: "(1) if
3 the activity is peaceful, lawful, and does not interfere with the
4 functions performed, it cannot be banned; (2) if there is
5 interference, the availability of alternative channels is
6 addressed; (3) [w]here the relevant audience is found only in a
7 particular place . . . [t]he bare possibility of alternative ways
8 to communicate the same message should not suffice to defeat the
9 first amendment claim." Allred v. Shawley, 232 Cal. App. 3d
10 1489, 1499 (1991) (internal quotations omitted). The party who
11 is attempting to prevent or halt expressive activity bears the
12 burden of establishing "basic incompatibility." Int'l Soc'y, 966
13 F. Supp. at 964.

14 Defendants here have not met their burden of
15 establishing the "basic incompatibility" of plaintiff's exercise
16 of his freedom of speech with the primary purposes of the
17 entrance, parking lot, and walkways of the park. In Carreras,
18 the court found that the exterior walkways and parking areas of a
19 stadium and convention center were areas where "the public was
20 free to come and go," and the primary purpose of these areas was
21 "to facilitate parking and allow for the free flow of pedestrian
22 and vehicular traffic." 768 F.2d at 1045. The court concluded

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24 defendant Six Flags, Inc. and the profits are split between the
25 MWJPA and Six Flags, Inc. Additionally, upon entering into this
26 joint venture with defendant Six Flags, Inc., defendant MWJPA
27 retained "overall responsibility for all activities and
28 facilities at Marine World." Thus, it is clear that the
relationship between the City of Vallejo and private entity
defendants is a closely intertwined partnership such that
constitutional standards of behavior apply here.

1 that solicitation was not incompatible with that purpose. Id.

2 Here, there is no indication that plaintiff seeks to do
3 anything other than peacefully and lawfully protest with a small
4 group outside the park. Plaintiff's proposed exercise of his
5 freedom of speech is also not incompatible with the primary
6 purpose of the area at the entrance of the park. Like the
7 stadium entrance in Carreras, the purpose of the park entrance
8 here is to facilitate the entrance into the park for members of
9 the public who wish to enter and are willing to pay a fee to do
10 so. On Memorial Day in particular, large numbers of people seek
11 to enter the park. The addition of ten members of the public to
12 these crowds seems negligible, even if the additional persons are
13 carrying signs and distributing leaflets.

14 Moreover, the presence of peaceful protestors is less
15 incompatible with the activity of entering the park than the
16 presence of people soliciting money is with respect to entrance
17 into a stadium. Solicitation of a potential customer involves
18 some degree of competition with the activity of paying a fee to
19 enter the stadium, whereas providing information and exercising
20 the right to free speech outside of a park does not. Thus,
21 plaintiff's proposed activity does not compete or interfere with
22 the activity of processing customers. Finally, there is no other
23 effective location to speak to the relevant audience, as
24 plaintiff and his group are protesting the care of animals at the
25 park, and it is unclear where visitors to the park would
26 congregate other than at the park itself. For these reasons, the
27 areas around the entrance of the park are public fora under the
28 California Liberty of Speech Clause.

1 b. Time, Place, and Manner Restrictions

2 Next, the court turns to the test applied to
3 regulations in public fora. "[I]n a public forum the government
4 may impose reasonable restrictions on the time, place, or manner
5 of protected speech, provided the restrictions 'are justified
6 without reference to the content of the regulated speech, that
7 they are narrowly tailored to serve a significant governmental
8 interest, and that they leave open ample alternative channels for
9 communication of the information.'" Savage v. Trammell Cow
10 Company, Inc., 223 Cal. App. 3d 1562, 1573 (1990) (citations
11 omitted); see also Kuba v. 1-A Agricultural Ass'n, 387 F.3d 850,
12 858 (9th Cir. 2004) (citing Ward v. Rock Against Racism, 497 U.S.
13 781, 791 (1989)).⁴ If even one prong of this test is not
14 satisfied, then the government's restrictions are
15 unconstitutional. See Grossman v. City of Portland, 33 F.3d
16 1200, 1205 (9th Cir. 1994).

17 First, there is no indication that defendants seek to
18 justify their regulations based on the content of the offending
19 speech, as the blackout days in the policy are based on days of
20 high attendance and not the expected content of the messages that
21 protestors would speak. Furthermore, it appears that defendants
22 may have a significant governmental interest in regulation.
23 Defendants presumably have an interest in preventing the
24 disruption of their business operations and interference with
25 customers, as well as ensuring the safety of their guests. The

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27 ⁴ With respect to time, place, and manner standards,
28 California law has been "fashioned from a long line of Supreme
Court cases," and federal standards may be applied to give
meaning to this doctrine. Kuba, 387 F.3d at 857-58.

1 interest in controlling large crowds and ensuring the orderly
2 movement and control of people has been found to be a substantial
3 consideration. See, e.g., Kuba, 387 F.3d at 858 (finding the
4 interests in "preventing traffic congestion and ensuring the
5 safety of pedestrians and drivers alike" significant); Heffron v.
6 Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650
7 (1981) ("[I]t is apparent that the State's interest in the
8 orderly movement and control of such an assembly of persons
9 [gathered at a fair] is a substantial consideration.").

10 Plaintiff does not seek to protest in the parking lot,
11 but rather plans to protest at the entrance to the park, so it is
12 not clear that traffic congestion provides a basis for the state
13 interest. Yet plaintiff does seek to protest on a weekend where
14 the park expects greater than usual attendance, so defendants'
15 interest in orderly crowd control may be significant. This
16 interest may also be hampered by plaintiff's plan to distribute
17 leaflets, as his interactions with the public will be somewhat
18 prolonged and the leaflets are likely to be disposed of
19 immediately, thereby creating additional trash for defendants to
20 clean. Significantly, however, defendants have not presented any
21 evidence to establish the strength of this interest.

22 Moreover, the policy devised by defendants is not
23 narrowly tailored to the interests they seek to protect.
24 Defendants have failed to show that plaintiff's proposed
25 communicative activity endangers their interests in crowd control
26 in any significant way. See Lim v. City of Long Beach, 217 F.3d
27 1050, 1054 (9th Cir. 2000) ("Traditionally and logically . . .
28 the party seeking to restrict protected speech has the burden of

1 justifying that restriction.") At a minimum, the policy requires
2 seven days of advance notice before a person can be given
3 permission to protest. Protest on the weekends during which the
4 largest audience is likely to be present is banned altogether, no
5 matter how many people seek to peacefully protest. Leaflets,
6 handouts, fliers, and other writings may not be distributed on
7 any day, which severely hampers the ability of a protestor to
8 pass along a meaningful message to the public. Assembly may only
9 take place in one of three areas in the park. These strictures
10 prevent a great deal of activity beyond what is necessary to
11 achieve defendants' interest in crowd control and safety, and are
12 not narrowly-tailored to this interest. Therefore, defendants'
13 policy appears to contain unconstitutional time, place, and
14 manner restrictions.⁵

15 For the foregoing reasons, plaintiff has shown a strong
16 probability of success on the merits and additionally that the
17 balance of hardships clearly weighs in his favor. Therefore, he
18 has established that a preliminary injunction is warranted.

19 B. Declaratory Relief

20 The court has heard this motion on an expedited
21 schedule on plaintiff's request, in an effort to accommodate his
22 interest in exercising his first amendment rights over the
23 weekend of May 27, 2006 (Memorial Day Weekend). By granting
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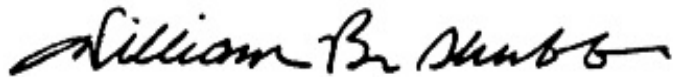
25 ⁵ It is additionally unclear that there are sufficient
26 alternative channels of communication, particularly given that
27 the weekends with the largest audiences are "blackout dates" for
28 assembly. However, "[t]he failure to satisfy any single prong of
the test invalidates the requirement," Grossman, 33 F.3d at 1200,
so analysis of the existence of alternative channels is
unnecessary here.

1 plaintiff a preliminary injunction, the court has ensured that he
2 will be able to exercise his rights on that weekend. Further
3 relief at this time is unnecessary to ensure that plaintiff's
4 constitutional rights to freedom of speech and assembly are
5 secure, and the court therefore declines to address his request
6 for declaratory relief at this time.

7 IT IS THEREFORE ORDERED that plaintiff's motion for
8 injunctive relief enjoining defendants from enforcing their
9 Public Assembly Policy as it pertains to plaintiff's proposed
10 activities over the weekend of May 27, 2006 be, and the same
11 hereby is, GRANTED.

12 IT IS FURTHER ORDERED that plaintiff's motion for
13 declaratory relief be, and the same hereby is, DENIED.

14 DATED: May 17, 2006

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17 WILLIAM B. SHUBB
18 UNITED STATES DISTRICT JUDGE
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